

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD SILBERG and	:	
LUANN SILBERG,	:	
	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
	:	No. 00-CV-3587
EMPLOYERS MUTUAL CASUALTY	:	
COMPANY,	:	
Defendant.	:	

**MEMORANDUM**

**GREEN, S.J.**

**January , 2001**

Presently pending is Defendant's Motion to Dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) and Plaintiffs' Response. For the following reasons, Defendant's motion will be denied.

**I. FACTUAL BACKGROUND**

Plaintiffs LuAnn Silberg ("Mrs. Silberg") and Richard Silberg ("Mr. Silberg") filed a complaint against Defendant Employers Mutual Casualty Company as a result of events relating to a motor vehicle accident. On August 16, 1996, Ms. Silberg was injured in a motor vehicle accident when another vehicle attempted to make a left turn in front of Mrs. Silberg's car. (Compl. at ¶ 6.) The other driver's recklessness and negligence allegedly caused the accident. (Compl. at ¶ 7.) The other driver's vehicle was insured with State Farm Insurance Company ("State Farm") for third party liability in the amount of \$50,000. (Compl at ¶ 8.) On June 23, 1997, at the request of State Farm, Mrs. Silberg was examined by Dr. Dane Wukich ("Dr. Wukich"), an independent medical examiner. (Compl. at ¶ 17.) Dr. Wukich issued a report confirming Mrs. Silberg's injuries. (Compl. at ¶ 17.) State Farm tendered \$50,000 to Mrs. Silberg on July 8, 1997. (Compl at ¶ 8.)

At the time of the accident, Plaintiffs were insured with Defendant. (Compl. at ¶¶ 9, 27.) Mrs. Silberg made a claim for benefits under Plaintiffs’ underinsured motorist coverage (“UIM”), which was capped at \$500,000. (Compl. at ¶ 9.) Because Mrs. Silberg asserted a right to payment under Plaintiffs’ insurance policy, Plaintiffs allege that Mrs. Silberg was a “first party” claimant under Pennsylvania law.<sup>1</sup> As a result, Defendant had statutory obligations to (1) investigate, evaluate and pay Plaintiffs’ claim fairly, objectively, and promptly; (2) treat Plaintiffs with the utmost fidelity and good faith; and (3) give Plaintiffs’ interest the same faithful consideration that Defendant gives its own. (Compl. at ¶ 11.) Plaintiffs allege that Defendant failed to honor these obligations. (Compl. at ¶ 12.) Specifically, Plaintiffs allege that Defendant (1) refused to make a reasonable or timely settlement offer; (2) attempted to change Dr. Wukich’s reports concerning the cause of Mrs. Silberg’s injuries; (3) delayed arbitration; and (4) initially refused to pay a portion of Plaintiffs’ arbitration award.

Plaintiffs filed the instant action against Defendant setting forth three (3) counts. Count I alleges that Defendant acted in bad faith in violation of 42 Pa.C.S.A. § 8371; Count II alleges that Defendant violated the Unfair Trade Practices and Consumer Protection Law (“UTPCPL”), 73 P.S. § 201-1 et seq.; and Count III alleges that Defendant committed fraud by “marketing itself as a company that its insureds could trust, and a company on which its insureds could rely for the prompt and fair evaluation of payment of their claims.” Jurisdiction is premised

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<sup>1</sup>First party claimant is “an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.” 31 Pa. Code § 146.2(b)

on diversity of citizenship between the parties.<sup>2</sup> Defendant filed a motion to dismiss Count II of the Complaint for failure to state a claim upon which relief can be granted. Defendant also moved to dismiss demands for punitive damages in Counts I and III on the same grounds. Additionally, Defendant moved for dismissal of the entire complaint for lack of subject matter jurisdiction. Plaintiffs filed a response.

## II. DISCUSSION

Fed. R. Civ. P. 12(b)(6) provides that a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. When considering such a motion, the district court must “accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them.” Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citation omitted). Dismissal is proper only where “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hison v. King & Spalding, 467 U.S. 69, 73 (1984).

In addition, Fed. R. Civ. P. 12(b)(1) provides that a party may move to dismiss a lawsuit for lack of jurisdiction over the subject matter. When considering a 12(b)(1) motion, the court is not bound by the “fact of the pleadings.” Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 410 n.10 (3d Cir. 1992). Dismissal is proper where the federal claim is “made solely for the purpose of obtaining jurisdiction” or where such a claim is “wholly insubstantial and frivolous.” Kulick v. Pocono Downs Racing Ass’n, Inc., 816 F.2d 895, 898 (3d Cir. 1987) (citing Bell v. Hood, 237 U.S. 678, 682-83 (1946)).

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<sup>2</sup>The Complaint alleges that Plaintiffs are citizens of Pennsylvania and Defendant is an Iowa corporation with its principal place of business in Des Moines, Iowa. (Compl. at ¶¶ 4-5.)

## **1. Punitive Damages**

Federal courts sitting in diversity cases apply federal procedural and state substantive law. See Hanna v. Plumer, 380 U.S. 460, 465 (1965). Therefore, Pennsylvania law will apply regarding the issue of punitive damages. Pennsylvania has adopted the Restatement of Torts § 908, which permits punitive damages, as follows:

1. Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter others like him from similar conduct in the future.
2. Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

Hoffman v. Memorial Osteopathic Hospital, 492 A.2d 1382, 1386-87 (Pa. 1985), quoting from Restatement of Torts § 908.

Defendant moves to dismiss Plaintiffs' demands for punitive damages in Counts I and III on grounds that both counts fail to state a claim for punitive damages. Defendant argues that there is no allegation to support the claim that Defendant's conduct was extreme, outrageous or malicious. The Complaint alleges that the parties entered into an insurer/insured relationship which demands fidelity and good faith. (Compl. at ¶¶ 11-12.) Count I alleges, in part, that Defendant offered Plaintiffs substantially less than the value of their claim; repeatedly attempted to influence Dr. Wukich's opinion to Plaintiffs' detriment; and initially refused to pay a portion of Plaintiffs' arbitration award. Count III alleges that Defendant fraudulently induced Plaintiffs to purchase insurance from Defendant. Viewed in a light most favorable to Plaintiffs, these allegations constitute, at a minimum, reckless indifference to Plaintiffs' rights as an insured.

Therefore, at this juncture, demands for punitive damages in Counts I and III are appropriate and Defendant's motion will be denied.

## **2. Unfair Trade Practices**

The Unfair Trade Practices and Consumer Protection Law ("UTPCPL") provides:

[a private cause of action for] . . . any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, as a result of the use or employment by any person of a method, act or practice declared unlawful by Section 3 of this Act . . . .

73 P.S. § 201-9.2. "In Pennsylvania, only malfeasance, the improper performance of a contractual obligation, raises a cause of action under the Unfair Trade Practices and Consumer Protection Law, . . . and an insurer's mere refusal to pay a claim which constitutes nonfeasance, the failure to perform a contractual duty, is not actionable." Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 307 (3d Cir. 1995) (citing Gordon v. Pennsylvania Blue Shield, 548 A.2d 600, 604 (Pa. 1988)). Allegations of misrepresentations and affirmative course of fraudulent conduct constitute malfeasance. Henry v. State Farm Ins. Co., 788 F. Supp. 241, 245-246 (E.D. Pa. 1992).

Defendant moves to dismiss Count II of the Complaint for failure to state a claim.

Defendant contends that Count II is not actionable under the UTPCPL because it only alleges nonfeasance—Defendant's alleged failure or refusal to promptly pay Plaintiffs' UIM claim.

Count II alleges, in part, that Defendant misrepresented the nature, extent, terms and conditions of the UIM coverage; misrepresented that it would promptly evaluate and respond to all reasonable UIM claims; misrepresented that it would promptly pay all such rightful claims in their full amount; and published misleading and deceptive promotional and advertising materials designed

to induce consumers such as Plaintiffs to purchase Defendant's insurance products and services. (Compl. at ¶ 34 a-c, g.) Viewed in a light most favorable to Plaintiffs, Count II alleges misrepresentation and fraud which constitutes malfeasance. Thus, at this stage of the proceedings, the allegations in Count II provide sufficient basis to support a claim under the UTPCPL and withstand Defendant's Motion to Dismiss.

In the alternative, Defendant moves to dismiss Paragraph 34(e) of Count II. Paragraph 34(e) states that Defendant violated the UTPCPL by "failing and refusing to comply with the statutes of the Commonwealth of Pennsylvania and the regulations of the Pennsylvania Insurance Department governing conduct of insurers." (Compl. at ¶ 34 e.) Defendant contends that Paragraph 34(e) alleges violations of the Unfair Insurance Practices Act ("UIPA"), 40 P.S. § 1171.1 et seq., which cannot serve as a basis for a UTPCPL claim. Contrary to Defendant's assertion, Paragraph 34 and its accompanying sections are pled as violations of the UTPCPL. Therefore, viewed in a light most favorable to Plaintiffs, Paragraph 34(e) alleges a cause of action under the UTPCPL. Defendant's motion will also be denied on this ground.

### **3. Jurisdiction**

Title 28 U.S.C. §1332 states in relevant part:

- (a) The district courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—
  - (1) citizens of different States . . . .

The amount in controversy "claimed by the plaintiff, if made in good faith, will be accepted unless it appears 'to a legal certainty that the claim is really for less than the jurisdictional amount.'"

Orndorff v. Allstate Insurance Co., 896 F. Supp. 173, 175 (M.D. Pa. 1995) (citing St. Paul

Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288-89 (1938)). Attorneys fees, costs, interest and punitive damages are included in the amount in controversy if they are available to successful plaintiffs under a statutory cause of action. See Suber v. Chrysler Corp., 104 F.3d 578, 585 (3d Cir. 1997). The Pennsylvania statute governing bad faith claims in insurance actions, 42 Pa.C.S.A. § 8371, provides recovery of punitive damages, court costs and attorneys' fees for successful plaintiffs.

Defendant moves to dismiss the entire Complaint for lack of subject matter jurisdiction on the grounds that it fails make any allegations to support a claim of relief in excess of \$75,000. Specifically, Defendant contends that the Complaint is devoid of any specific facts to support Plaintiffs' prayer for compensatory damages. In response, Plaintiffs argue that the jurisdictional amount is satisfied on three (3) independent grounds: (1) Plaintiffs' claim for punitive damages; (2) Plaintiffs' claim for attorney's fees; and (3) Plaintiffs' claim for interest on their uninsured motorist benefits.

Count I demands judgment in excess of \$150,000, including punitive damages, attorneys' fees, interest and costs; Count II demands judgment as authorized by 73 P.S. § 201-9.2; and Count III seeks judgment in excess of \$150,000, exclusive of interest and costs, plus cost of suit. The foregoing discussion demonstrates that Plaintiffs' demands for punitive damages in Counts I and III are appropriate. Furthermore, there is no evidence that Plaintiffs' demand was made in bad faith. Thus, viewing the evidence in a light most favorable to Plaintiff, I am unable to say to a legal certainty that Plaintiffs will be unable to recover an amount in excess of \$75,000 in the present matter. Defendant's motion is therefore denied on this ground.

An appropriate Order follows.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RICHARD SILBERG and  
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Plaintiffs,

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CIVIL ACTION



v.	:	
	:	No. 00-CV-3587
EMPLOYERS MUTUAL CASUALTY	:	
COMPANY,	:	
Defendant.	:	

**ORDER**

**AND NOW**, on this            day of January, 2001, upon consideration of Defendant's Motion to Dismiss and Plaintiffs' Response, **IT IS HEREBY ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint is **DENIED** on all grounds.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.